UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RIVER LIGHT V, L.P. and
TORY BURCH LLC,

        Plaintiffs,

    v.

OLEM SHOE CORP.,

        Defendant.

C.A. No. 1:20-cv-07088-LGS

**[PROPOSED] ORDER REGARDING
PROTOCOL FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION**

The Parties jointly submit this Protocol for the Discovery of Electronically Stored Information (the "ESI Protocol"), and hereby agree that the following shall govern the production of paper records and electronically stored information ("ESI") by the Parties in the above-captioned adversary proceeding on or after January 29, 2021 (the "Effective Date"). The ESI Protocol shall also govern productions made by any third party who is subpoenaed in this action on or after the Effective Date, unless otherwise agreed to by the issuing Party and the third party. Accordingly, the ESI Protocol shall be attached to any subpoena issued in this action on or after the Effective Date.

A.   **Search Repositories and Custodians**

    1)   Each Party shall identify to the other Party the particular custodians whose files to which it wishes to have search terms applied for purposes of receiving responsive documents from the other Party. The parties will work with each other to provide

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responses in discovery that facilitate the identification of custodians by the other Party.

2) With respect to any agreed upon custodian, the Parties agree that each Party will search all reasonably accessible repositories that are likely to contain discoverable information responsive to a discovery request and that are in that Party's custody, possession, or control, including custodial data sources (*e.g.*, email accounts, personal files, computers, hard drives, personal network drives, USB drives, collaborative software programs such as DropBox and Google Documents, etc.), non-custodial data sources (*e.g.*, shared drives, servers, etc.), and paper records. Nothing in this ESI Protocol is intended to relieve any Party from its obligations to look for and collect physical or hard copies of documents a particular custodian identified may have in his or her possession.

3) The Parties are not obligated to search an electronic repository if, after a reasonable investigation, it is determined to not be reasonably likely to contain relevant information. A Party may object to discovery of ESI from sources that the Party identifies as not reasonably accessible because of undue burden or expenses and such objection shall identify the reason for such undue burden or expense (as defined in the Court's Individual Rules, the Local Rules of the Southern District of New York, Fed. R. Civ. P. 26(b)(2)(B), and in Section A.6 below). On a motion to compel discovery or for a protective order relating to the discovery of ESI, the objecting Party bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

4) The Parties will perform the searches using any software tool or tools that are capable of indexing and searching files and emails, including the contents of the attachments.

5) Nothing in this ESI protocol is intended to relieve any Party from any obligation to supplement responses to document requests in light of discoverable documents identified in that Party's productions or in light of any other information learned during the course of discovery. Should a Party's document production, or other discovery conducted in the case, reveal other discoverable or otherwise relevant documents that have not been produced, the other Party has a right to discovery of any such additional documents, consistent with each Party's obligations to seasonably supplement discovery under the Rules.

6) Per the Court's Individual Rule for Civil Litigation II.A.1., except with leave of Court for good cause, or agreed otherwise by the Parties, the Parties shall not be required to search for responsive ESI (a) From more than 10 key custodians; (b) that was created more than five years before the filing of the lawsuit, except with respect to requests specifically agreed to otherwise between the parties; (c) From sources that are not reasonably accessible without undue burden or cost; or (d) For more than 160 hours, inclusive of time spent identifying potentially responsive ESI, collecting ESI, searching that ESI, and reviewing that ESI for responsiveness, confidentiality, and for privilege or work produce protection. The producing Party shall be able to demonstrate that the search was effectively designed and efficiently conducted.

B.   **Search Terms:** For all ESI produced on or after the Effective Date, the Parties

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agree that any Party producing ESI discovery may use search terms to limit the volume of ESI it

must review for responsiveness to document requests, subject to the following limitations:

1)   Each Party requesting discovery of ESI will generate and deliver no more than 50

reasonable search terms to the other Party. A "search term" as discussed herein

can be a single word, a phrase, or a search string with connectors (such as "apple

/5 tree" or "apple AND tree"). Absent a Court order otherwise, no Party has an

obligation to review for any search terms it believes to be facially unreasonable,

unduly burdensome, or otherwise inconsistent with its obligations under the rules.

The parties must confer regarding facially unreasonable, unduly burdensome or

objectionable search terms to work together to determine how to revise those terms

to remedy any objectionable terms. While search terms may be facially

unreasonable or burdensome, search terms also may be revealed as unreasonable

or burdensome based on the number of document hits obtained after such search

terms are conducted across the relevant document custodians' ESI. The Parties

agree to work together to resolve search terms that result in unreasonably high hit

counts. In any event, the Parties will meet and confer over any disputes relating

to the number and scope of the search terms. To the extent the Parties cannot reach

agreement regarding search terms, the Parties may take the issue up with the Court.

Once the Parties have agreed to search terms to be conducted, the producing Party

will review for responsiveness ESI that contain one or more of the relevant search

terms. If the producing Party intends to use any additional culling techniques other

than search terms (*e.g.*, predictive coding), it will meet and confer with the

requesting Party to discuss the tool, method, and parameters it intends to utilize prior to using that technique.

2) The producing Party will run the search terms in a non-case-sensitive manner. Hyphenation of terms will not affect search results (*e.g.*, a query for "all inclusive index" will return "all-inclusive index" and vice versa). Search terms should be run to identify documents and communications that include search terms as whole words or parts of words, as indicated by an asterisk (*) symbol.

3) Search syntax should be crafted and run using the following Boolean search functions:

Operator	Use	Example
And	Results include all keywords linked with AND	apple AND tree
Or	Results include either keyword or all of them	apple OR tree
( ) Parentheses	Groups multiple search strings and sets priorities	(apple tree)
" " Quotation marks	Searches for exact phrases	"apple tree"
* Asterisk	Searches for word variations	apple tree* (will find tree, trees, treetops)
/n Forward slash + number	Searches for words that appear within a certain proximity of one another	apple /5 tree

If the search syntax required by a Party's search tool is different from the search syntax provided, such Party will provide notice of the actual syntax used for the search prior to conducting the search.

4) The fact that any document or ESI is captured by the search query described in this Paragraph does not mean that such document is responsive to any document

request or otherwise relevant to or admissible in this litigation. The Federal Rules of Civil Procedure, the Local and Individual Rules of the Southern District of New York and this Court, the Parties' document requests and responses thereto, the claims and defenses asserted by the Parties, any agreements reached by the Parties, and Court Orders shall govern the scope of documents to be produced.

5) It is anticipated that in due course of discovery, additional search terms may be reasonable to request. After the Parties' first review and production of ESI, a requesting Party may seek a reasonable number of additional reasonable search terms either by agreement or, if agreement cannot be reached, from the Court on the basis of good cause shown.

C. **Electronically Stored Information.** For all ESI produced by the Parties on or after the Effective Date, the Parties agree to produce such ESI according to the following specifications:

1) <u>TIFF Format</u>. All ESI produced on or after the Effective Date will be produced in TIFF format, except that Excel files shall be produced in native file format in the first instance, with a TIFF image placeholder for native files in the production.[1] In addition, if documents produced in TIFF are illegible in TIFF format due to the format of the produced document, a party may request a different format, including native, to facilitate receiving the document in a readable format. All TIFF formatted documents will be single page, Group 4 TIFF at 300 dpi resolution and 8½ x 11-inch page size, except for documents requiring different resolution or

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[1] Notwithstanding the foregoing, any ESI requiring redaction may be produced in TIFF format.

page size. To the extent practical, Bates numbers shall be endorsed on the images so that the numbers print.

2) Images. Each imaged version of an electronic document will be created directly from the original electronic document. Color documents (*e.g.*, color photographs or graphical representations in color) shall be produced as black & white, single-page TIFF images in accordance with the technical specifications set out above, unless agreed with the opposing Party or ordered by the Court. If color images are more practical, the files shall be delivered in single page, JPEG format.

3) Image Load Files. An image load file, in standard Opticon format, showing the Bates number of each page and the appropriate unitization of the documents, will accompany all document images. The total number of image files referenced in the image load file should match the total number of images in the production delivery.

4) Text Files. The producing Party will produce an extracted text file, in UTF format where appropriate, for each electronic document. For documents that do not contain searchable text, OCR text files shall be produced in the same text-searchable format used by the producing Party at no cost to the receiving Party. Extracted text will not be provided for electronic documents that have been redacted—*e.g.*, for attorney-client privilege—because the extracted text would reveal the redacted information. Instead, these files should be run through an OCR process to capture the visible text only and the results exchanged in lieu of the original extracted text.

5) Metadata.

a) <u>TIFF Documents</u>. For ESI to be produced in TIFF format, the following

metadata fields associated with each electronic document will be produced,

where available:[2]

Field	Description	File Type
BegBates	First page of document	All
EndBates	Last page of document	All
BegAttach	First page of family range	All
EndAttach	Last page of family range	All
Custodian	Name of custodian	All
Subject	Email subject	Emails
To	Email recipient	Emails
From	Email sender	Emails
CC	Email CC	Emails
BCC	Email BCC	Emails
DateSent	Email date sent	Emails
TimeSent	Email time sent	Emails
DateReceived	Email date received	Emails
TimeReceived	Email time received	Emails
FileName	Original file name	Attachments/Files
FileExt	File extension	Attachments/Files
DateCreated	Date file was created	Attachments/Files
TimeCreated	Time file was created	Attachments/Files
DateLastMod	Date file was last modified	Attachments/Files
TimeLastMod	Time file was last modified	Attachments/Files
Title	Title from file properties	Attachments/files
Author	File author	Attachments/files
MD5 Hash	The MD5 hash value of the native file	All
NativeFile	Path to native files as produced	Attachments/files
TextFile	Path to text file for the document	

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[2] Nothing in this order requires the parties to create metadata or include metadata fields if none exists for a particular document. For example, some documents, such as old documents saved in hard copy, pdf, or other formats may not have such metadata or identifiable custodian available.

b) <u>Native Format Documents</u>. As set forth above, Excel documents shall be produced in native file format in the first instance, with a TIFF image placeholder for native files in the production. Documents to be produced in native format will be produced with the following specifications:

    i.   A unique document number shall be used as the file name and the original file name and file extension shall be preserved in the corresponding load file.

    ii.   The native format documents shall be accompanied by reference information that sets forth for each document, sufficient information to allow tracking and authentication of the native format documents produced, including: (i) the name of the custodian from whose files the electronic file is produced; (ii) an appropriately calculated "MD-5 Hash Value"; (iii) the original name of the file; and (iv) a document control number.

    iii.   Any file produced in native format need not be imaged. Instead, a single page placeholder image shall be provided that indicates the file was produced in native format and contains the bates number and confidentiality designation of the corresponding file.

    iv.   When producing spreadsheets in other than their native formats (*e.g.*, for redacted documents), the producing Party shall include all hidden rows, columns, cells, worksheets, data, comments, or formulas, as well as any associated headers or footers.

c) <u>Data Load Files</u>. Fielded data should be exchanged via a document-level-database load file in one of two delimited formats: (a) standard Concordance (DAT) or (b) tab delimited (TXT).

d) <u>Deduplication</u>. The Parties may dedupe globally (*i.e.*, across all custodians). A document may be removed as duplicative only if it is identical to another document that is being produced, based on a comparison of MD5 or equivalent hash values.

e) With the exception of image or signature files that are otherwise contained in the parent email, documents will be produced in full families with appropriate metadata. Privileged documents that are part of large responsive and non-privileged families should be produced with a slip sheet that states "Withheld as Privileged," or with redactions of the privileged material as appropriate.

D.   **Paper Records.**   Paper records will be scanned or otherwise converted into electronic form from paper documents in the following format:

1) <u>TIFFs</u>. All documents shall be scanned to single page Group 4, TIFF format, at least 300 dpi and 8 ½ x 11-inch page size, except for documents requiring higher resolution or different page size. Each image file should have a unique file name which shall be the Bates number of the page.

2) <u>Scanning</u>. In scanning paper documents, distinct documents should not be merged into a single record, and single documents should not be split into multiple records (*i.e.*, paper documents should be logically unitized).

3) <u>Objective Coding Fields</u>.   The following objective coding fields should be provided, if applicable: (1) beginning Bates number; (2) ending Bates number;

(3) beginning attachment Bates number; (4) ending attachment Bates number; (5) page count; and (6) source location/custodian.

4)   OCR Text Files. Each Party should make its production text-searchable unless that Party does not intend to make its production text-searchable for its own and/or its counsel's use in this litigation and the Party's documents do not already exist in text-searchable format independent of this litigation. OCR text files shall be produced in the same text-searchable format used by the producing Party at no cost to the receiving Party. The produced text files will not contain any redacted portions of any redacted documents.
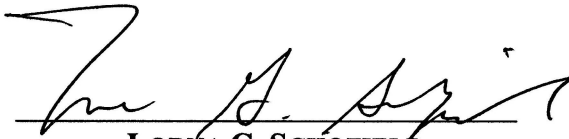
E.   Productions shall be produced via secure file transfer such as SFTP or Citrix ShareFile. As an alternative, productions totaling more than 5 gigabytes of data may be encrypted or otherwise password protected and placed on a generally accepted electronic medium, such as a USB thumb drive or external hard drive and delivered to the offices of opposing Party's counsel.

F.   The Parties shall meet and confer in good faith during the course of fact discovery regarding the contents of any privilege log or to address any dispute arising out of this Protocol. Privilege logs shall be served in accordance with the deadline for close of fact discovery. The inadvertent production of privileged or confidential ESI shall be addressed pursuant to the Agreed Motion for Entry of Protective Order (Pending the Court's Approval; Filed ECF No. 31) entered in this matter.

G.   The production of ESI shall not constitute a waiver of attorney-client privilege or

work-product protection if the disclosure was inadvertent and the Party making the claim of

privilege or protection shall promptly take reasonable steps to recover the ESI.

SO ORDERED.

Dated: February 1, 2021
      New York, New York

                                        LORNA G. SCHOFIELD
                                  UNITED STATES DISTRICT JUDGE